FILED
SEP 21 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 385

THE CITY OF ST. LOUIS, ANNE M. EVANS, HENRY ERNST, SARAH ERNST and J. E. HANGER,
Petitioners,

vs.

CHARLOTTE CLARK LINDSAY,
Respondent.

Brief for Respondent in Opposition to the Petition of Petitioners for a Writ of Certiorari.

Harry E. Hawes
Carl L. Ristine
HAWES & RISTINE,
LEE A. HALL,
Attorneys for Respondent.

4 North Eighth Street, St. Louis, Mo.

GIBSON PRESS, 106 South Ninth Street, St. Louis—CHestnut 0990

INDEX OF TOPICS.

Brief of respondent in opposition to the petition of petitioners for a writ of certiorari.

PAGE

Statement of Facts 1

Argument 5

- Questions Involved 5
- Facts Found 5
- Precedents Cited by Petitioners 5
- Respondent a Citizen of Kansas City, Mo. 6
- General Law of Missouri 6
- Right to Sell Property of Citizen Without Actual Notice 7

CITATIONS IN SUPPORT OF BRIEF FOR RESPONDENT.

	PAGE
Black et al. v. Banks, 37 S. W. (2d) 594, 596	7
Broad River Co. v. South Carolina, 281 U. S. 537, 540	8
City of St. Louis v. Miller et al., 82 S. W. 579, 580	6
Davis v. McCann, 143 Mo. 172, 178	12
Evans v. Mo. State Life Ins. Co., writ denied—56 S. Ct. 123; rehearing denied—56 S. Ct. 168	6
Honeyman v. Hanan, 300 U. S. 14, 18	5
Mangold v. Bacon, 237 Mo. 496, 521	8
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 97	5, 10
Section 344 (b), Title 28, U. S. Jud. Code	5
Section 1099, R. S. Mo. 1929	10

ERRATUM.

By mistake, **J. E. Hanger,** who was a defendant, was included in the title; although he **is not a petitioner herein.**

IN THE

Supreme Court of the United States

No. 385, OCTOBER TERM, 1940

THE CITY OF ST. LOUIS, ANNE M. ERNST, HENRY ERNST, SARAH ERNST and J. E. HANGER,

Petitioners,

vs.

CHARLOTTE CLARK LINDSAY,

Respondent.

STATEMENT.

This is a proceeding by certiorari to review the final judgment of the Supreme Court of Missouri, affirming a decree in equity, with modifications, which decreed the cancellation of a sheriff's deed of real estate to petitioner Anne M. Evans, her deed to petitioners Henry and Sarah Ernst and their deeds of trust to petitioner J. E. Hanger's trustee.

The main facts are these: In the early part of 1925, petitioner, The City of St. Louis, filed a condemnation suit for the construction of Clayton Avenue. The real estate involved was in the benefit district, and then owned by Sarah Ida Jackson.

In June, 1925, respondent and her husband bought that property, took title in Miss Gutch, who conveyed it to respondent and her husband, who conveyed it to respondent's mother, who conveyed it to respondent.

At the time the Lindsays bought the property, they

obtained a certificate of title which did not show the pendency of the condemnation suit.

The commissioners assessed $7.50 benefit taxes against Mrs. Jackson's property (Trans,, p. 39), which ripened into a special judgment in September 21, 1925 (Trans., p. 31).

The City waited nearly ten years and then in August, 1935, had execution returnable to the September Term, 1935, issued to foreclose the $7.50 special lien judgment.

The sheriff advertised the property for sale on September 14, 1935, and sold it to petitioner Anne M. Evans for $85.00. Miss Evans obtained her deed, recorded it, and remained quiet until March, 1936. She conveyed the property to petitioners Henry and Sarah Ernst, for One ($1.00) Dollar, and the unsecured notes of petitioner J. E. Hanger for $3600.00. The Ernsts then executed two deeds of trust to J. E. Hanger's trustee, and Miss Evans traded J. E. Hanger's unsecured notes for the deeds of trust.

On March 7, 1936, Miss Evans, claiming to act as attorney for Henry and Sarah Ernst, demanded the property from respondent's rental agent, and it was surrendered to Miss Evans.

Respondent filed suit in equity, setting up the foregoing facts, that she had no notice of the condemnation suit, the assessment of special benefits against the property, the special lien judgment, that she lived in Kansas City, Missouri, and that six days after the sheriff sold her property, which she valued at $7500.00, she paid three years back general taxes against the property, with penalties. She also alleged that Miss Evans was trying to defraud her out of her property by unfair methods, that the $85.00 was an inadequate consideration and that J. E. Hanger, his trustee and the Ernsts were straw parties for Miss

Evans, who was the real party claiming title to this real estate. It is noted that respondent's petition is not contained in the transcript, but the above facts do appear in the decree of the chancellor, and their brief.

The petitioners appealed to the Supreme Court of Missouri, which affirmed the chancellor's decree cancelling the sheriff's deed, the deed from Evans to the Ernsts and the deeds of trust from the Ernsts to J. E. Hanger's trustee. The chancellor found that the consideration was inadequate, that respondent's property had been sold without any actual knowledge on her part of the special lien judgment or the sheriff's sale, and without due process of law. That the Ernsts, Mr. Hanger and his trustee were straw parties for Miss Evans, that Miss Evans was the only real claimant of the property and had sought by unfair methods to deprive respondent of her property, for an inadequate consideration.

In affirming this decree, the Supreme Court directed the chancellor to modify it by basing his relief on inadequacy of the price paid by Miss Evans, and the actions of the defendants (Trans., p. 53).

The appellants below, petitioners here, filed their motions for modification, for a rehearing and to transfer the case to the Supreme Court in banc, which motions were overruled (Trans., p. 60).

In appellants' motion to transfer the case to the court in banc, petitioners attempted to inject a claim that the opinion or decision of the Supreme Court was a denial to them of the protection of Section 1 of the Fourteenth Amendment to the Constitution of the United States (Trans., p. 59, paragraph 1).

Miss Evans, in her motion for a new trial, did not claim a right under federal law, but did claim that the chancellor erred in holding that respondent's property was sold without due process of law. Thus she is put in the position of complaining in the Supreme Court, because that Court directed the chancellor to eliminate his ruling that respondent's property had been sold without due process of law, which the Supreme Court did by inference when it directed the chancellor to base his relief to respondent on the inadequacy of price and the actions of Miss Evans and her straw parties.

ARGUMENT.

I.

The questions are: (a) was a federal right claimed by petitioners, denied to them, and (b) if so, did the non-federal grounds upon which the Supreme Court of Missouri based its opinion in this case constitute under the facts, a fair or substantial basis for its decision.

> Honeyman v. Hanan, 300 U. S. 14, 18.
> Sec. 344, paragraph b, U. S. Jud. Code.

The chancellor heard and saw the witnesses, found against petitioners, they appealed and the Supreme Court, having the complete evidence before it, affirmed the decree of the chancellor.

This Honorable Court is conclusively bound by the facts found by the State Court, especially as the evidence upon which those findings of fact are based is not included in the transcript.

> Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 97.

II.

A large part of petitioners' brief is devoted to alleged errors involving purely state questions.

It is the settled rule of the Supreme Court of Missouri that before a citizen of Missouri can be deprived of property by execution under a judgment, the owner must have had actual notice.

That where the owner is actually served with summons, or appears and defends, such owner has had the actual

notice required by law. That non-resident owners may be served by advertisement, for there being no way to serve them within the jurisdiction of the court, the constructive notice binds such non-resident owner from the necessity of the case.

Respondent was a resident of Kansas City, Missouri, being a registered voter there at the time her property was sold, and she testified positively that she did not know of the special lien judgment nor of the sheriff's sale of her property and that she had paid three years back general taxes on her property six days after it had been sold by the sheriff. Petitioner Evans admitted that she was surprised to learn that respondent had paid those back taxes. She tried to make it appear that she did not learn this until after she obtained a certificate of title, but such testimony was very unconvincing.

It is the law of Missouri that the owner whose property has been sold under execution, has all of the return term within which to move the execution division to set the sale aside.

Miss Evans had had experience with that rule. In the case of City of St. Louis v. Miller et al., 82 S. W. (2d) 579, Miss Evans had acquired real estate at a sale for taxes. The owner, learning of the sale before the return term expired, moved the execution division to set the sale aside and the Court sustained the motion which was affirmed on appeal. Miss Evans then applied for a writ of certiorari from this Honorable Court, which it denied.

Evans v. Ins. Co., 56 S. Ct. 123, 168.

In passing, we note the fact that in the Miller case, supra, Miss Evans contended that the owner's remedy, if any, was a suit in equity (loc. cit. 580), while in the

Lindsay case she contends that respondent was guilty of laches because she did not move the execution division within the return term to set the sale aside, although respondent testified that she did not know her property had been sold until after March 7, 1936, nearly six months after the sheriff's sale. There was absolutely no evidence that respondent had any actual notice of the condemnation suit, the special assessment, the special lien judgment or the sheriff's sale.

In the Miller case, supra, the City expressed a willingness that the sale be set aside (loc. cit. 581). In this case the City, although it had its money in full, interest and costs, refused to consent in this case and is here opposing respondent, using every argument it can devise to aid petitioner Evans to keep respondent's property valued at $5,000.00, and sold to satisfy a special lien judgment of $7.50, of which respondent did not know, and therefore had no chance to protect her property, for $85.00.

III.

The only apparent interest that the City of St. Louis has in this case is to have the Court declare that it may sell a citizen's property on published notices under Article XXI of its charter, regardless of whether or not the owner has had any actual notice of its special lien judgment.

> "It is fundamental and essential to due process of law that persons living in this state be given actual notice of suits affecting their property rights and an opportunity to be heard and take steps to protect such rights both before and after judgment."
>
> Black et al. v. Banks (Mo. Sup.), 37 S. W. (2d) 594, 596.

IV.

The state court may ignore the federal right, although properly and timely claimed, if under the facts a fair basis for its decision exists without the federal right.

Broad River Co. v. South Carolina, 281 U. S. 537, 540.

The evidence shows that respondent was the owner of the property in question. That she did not know of the special lien judgment, the execution or sale of her property for about 2% of its value. That before petitioner Evans conveyed the property to the Ernsts, she knew that respondent had paid three years back taxes on the property six days after the sheriff sold it to Miss Evans. That Miss Evans recorded her deed, and then waited nearly six months before she demanded the property for her alleged innocent purchasers for $1.00 and $3600.00 in the unsecured notes of J. E. Hanger, who testified that he did not owe the Ernsts anything at the time he gave them his notes for $3600.00. That he traded his deeds of trust but never had any notes secured thereby, to petitioner Evans when he found that respondent had filed suit to cancel the sheriff's deed, the deed of Evans to the Ernsts and the deeds of trust from the Ernsts to J. E. Hanger's trustee.

This whole transaction sounds like it was shady.

> "When a cause is in chancery, it is in conscience. We think the conservative and better doctrine is that a court of equity in Missouri, acting with caution and only in an aggravated case, and when no aid from other equitable considerations is at hand, may set aside a sheriff's deed on the sole ground of a consideration so grossly inadequate as to shock the conscience."
>
> Mangold v. Bacon, 237 Mo. 496, 521.

We do not feel it necessary to follow counsel in their argument on the binding force of state decisions. We do not agree with counsel as to the binding force of the prior Missouri cases.

Time out of mind courts have overruled, criticized and distinguished their prior decisions, and in contending that previous decisions rule the case at bar or if the Court ignored them altogether, it is a far fetched proposition to say that the Court has deprived a party of a vested right, or has denied them a right under federal law.

V.

Petitioners contend that the Supreme Court of Missouri is inconsistent in its decision, in that it affirmed the chancellor's decree in all things and then remanded the case with directions to modify the decree and base his relief to respondent on inadequacy of the price paid for the property and the actions of Miss Evans and her straw parties.

The substance of the decree was that respondent, having been deprived of her property without actual notice, for an unconscionably low price, and by unfair methods, petitioner Evans and her straw parties had sought to make the deprivation complete, hence the deeds should be cancelled.

And that was the substance of what the Supreme Court affirmed, and in writing up the judgment, the clerk seems to have used the words "be in all things affirmed" (Trans., p. 54).

While the opinion in the concluding paragraph (Trans., p. 53), only says

> "the judgment is affirmed and the cause is remanded with directions to modify the decree nisi and base the relief granted respondent upon the issue of inadequacy of price and the actions of defendants Evans, Hanger, and the Ernsts as herein discussed."

The alleged inconsistency is merely a misprision of the clerk, at best a formal error only remotely, if at all, affecting the case. It is strictly a state question in no way affecting petitioners' rights under the Constitution or laws of the United States.

Section 1099, R. S. Mo. 1929, provides that a judgment shall not be affected by "any other default or negligence of any clerk * * * by which neither party shall have been prejudiced."

This Honorable Court in certiorari proceedings does not sit as a court of general review.

> Waters-Pierce Oil Co. v. State of Texas, supra, 212 U. S. 86, 97.

VI.

The respondent claimed in her petition that her property had been sold without due process of law in that she never had any actual knowledge of the condemnation suit, the assessment of special benefits and judgment against the property or of the sheriff's sale thereof.

The petitioners specifically denied that the sale was conducted without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

While the chancellor did decree that respondent's property had been sold without due process of law in violation of the Federal Constitution, the Supreme Court of Missouri on appeal directed the chancellor to base his relief on inadequacy of price and the actions of petitioners Evans, the Ernsts and the Hangers. The effect of this decision of the State Supreme Court was to eliminate the federal question raised by the respondent.

VII.

As to the Supreme Court's holding that respondent did not have actual knowledge of the proceedings for the improvement of Clayton Avenue, the judgment or of the execution sale before respondent's rental agent was notified (March 7, 1936), the petitioner City contended in its motion to modify (Trans., p. 55) that unless the published notice was sufficient, then the decision was liable to be misconstrued to require actual knowledge in addition to published notice as provided by Article XXI of the City's Charter; and unless so modified, the opinion would have a very serious effect on future bids at execution sales under special benefit judgments.

That contention of the City only appealed to the Supreme Court of Missouri to construe the law of Missouri in a way to aid the City in future sales of property under special assessment lien judgments. If there is any merit in the contention, it was purely a state question, and did not involve any federal right.

VIII.

It is also the rule in Missouri that the sheriff in selling property under an execution is the agent of both parties, and it is his duty to see that the property is not sacrificed. If he cannot obtain a fair price for it, he should adjourn the sale for the want of bidders.

Davis v. McCann, 143 Mo. 172, 178.

In this case the sheriff sacrificed respondent's property. The City got its part of three years back taxes which respondent paid six days after the sheriff's sale (which is mighty persuasive evidence that respondent did not know of the special lien judgment or that her property had been sold).

Every rule of natural justice cries out against this sale and the actions of petitioner Evans and her straw parties.

The questions involved were rules of real property, and execution sales under state law.

We respectfully submit that the writ of certiorari should be denied.

HAWES & RISTINE,
LEE A. HALL,
Attorneys for Respondent.